



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

HARVARD LAW REVIEW.

VOL. II.

MARCH 15, 1889.

No. 8.

COMPARATIVE MERITS OF WRITTEN AND PRESCRIPTIVE CONSTITUTIONS.

IN the mind of every intelligent man the question must sometimes arise, whether the political institutions of his country, and especially its constitution, are superior to those of other nations, and, if so, in what the superiority consists. The American who directs his attention to the constitution of the Federal Union is not likely to regard this question as one upon which there can well be a difference of opinion. The establishment of the federal constitution, whether we regard it in the light of its undoubted benefits to the people immediately concerned, or consider its more remote influence upon the institutions of other countries, was an act of organization and of government with which, for value and importance, no other in the history of mankind is comparable. It did not create the American States or the American Union, for these were in existence before; but it saved the States from anarchy, and it settled a tottering Union upon the only basis that was at once a foundation of solidity and of growth, of permanence and of evolution. It converted a loose confederacy into a nation; and that nation, though feeble in its beginnings, has in the compass of a century overflowed and mastered the major part of the continent; and now, in the number and intelligence of its people, in national resources and power, it takes unchallenged place with the leading nations on the globe. History tells no other story of expansion so rapid, of progress so steady, of growth that in its promise appears so assuring. Many causes have contributed to the marvellous

growth, and to the general prosperity and order which have accompanied it ; but chief among them has been the establishment, through the patriotic statesmanship of those who achieved independence, of efficient and stable representative institutions, through the adoption of the constitution of the United States.

The federal constitution was not a perfect instrument ; no instrument of government ever was. If anything can be safely predicated of the divine purpose, it is that mankind shall not remain in a stationary condition, but shall advance from age to age, from a lower to a higher state of being, and this not less in what pertains to government than in other respects. The nineteenth century has been one of marvellous progress, which has nowhere been more marked than in the political institutions of European nations. With the exception of Russia and Turkey, there is, perhaps, not to-day a nation in Europe whose government is not greatly in advance of what would have been possible to establish for it a century ago. England is a monarchy in little more than name, and France, whose people were then under a despotism of almost incredible rigor, is now a republic ; but the wisest and best statesmen of neither of these countries a century ago would have advocated a government on a representative basis such as is now established. The reason that would have been perfectly conclusive against it is that the time had not come when such institutions would be accepted and supported by the people. The wise statesman will not outrun the people in governmental changes ; he must keep them abreast with him if apparent reforms are to be reforms in reality. Like things may be said of Italy and other European countries to those said of England and France ; they have gradually come up to what was impossible when the federal constitution was under discussion. But even the federal constitution, as we now admit, was far from being perfect. Nothing but the paramount necessity of a more efficient Union, and the impossibility of establishing it otherwise than upon a compromise of views, justified the toleration of the great evil of human slavery, in this charter of free government. It was a blot upon an instrument that could not possibly, at the time, have been made immaculate. The fact is now sometimes very thoughtlessly made a ground of accusation against those who framed it ; but, when it is considered that it was the best that at the time was possible, the injustice of such an accusation becomes

manifest. If we insist upon perfect laws, and will have no others, we shall never have any at all ; we shall be left to battle for perfection in a condition of hopeless anarchy. Bad as the compromise was in some aspects, we shall do well to remember that the constitution was the imperative need of the hour, and that to its establishment was due the fact that slavery in the States was at last brought within reach of the power that could strike the fatal blow. A great statesman, given by New York to the Union, once said : " I early learned from Jefferson that in politics we must do what we can ; not what we would." It was a wise saying. In government we must strive for what is best, but we must be content to put up with something less than perfection. The golden rule appeals to the heart and the conscience of the individual man, but it cannot be incorporated in legislation to be enforced by magistrates and the police. And even if it could be, there would be many things in government to which it could have little or no application ; things which concern public policy only, and in respect to which the rules of morality and right give little or no guidance.

No people, however highly endowed in other respects, ever rose above the state of barbarism, unless it possessed the organizing faculty, the genius for law and settled institutions, the willingness to submit to rule, and a perception of its necessity. It was because he had these that the brutal Saxon has in time developed into the law-respecting and law-abiding Englishman and American. Without them he would have been as savage now as he was when we first hear of him. It has been humorously said, but with substantial truth, that if a chance meeting of Americans were to take place in a desert, they would immediately organize and hold an election. The election would mean order and security. Let one of their animals be stolen, and a lynch court would be organized, and perhaps a hanging take place. This, in a sense, would be lawless ; but it might be the first step in a process of evolution that in time would give established courts and eminent jurists to a great commonwealth. The lynch court that gives us rude justice, when no other is possible, is infinitely preferable to no court at all. Americans have not inaptly been called the Romans of the modern world, because of their instinct for political construction, and for laying broad and deep the foundations of governmental structure. Possibly there may be discovered

in their constitution building, as well as in general legislation, a tendency to particularize too much ; to impose too many restraints. This, however, when carefully considered, may prove to be a fault less serious than its opposite, — a fault that, at least, leans to virtue's side. The higher the civilization of any people, the more extensive will be the recognition of inherent and indefeasible rights ; and as these can have substantial value only when the law protects them, our institutions may be expected to expand with social and industrial progress, and the citizen will be subjected to new restraints for the protection of new rights which were either not clearly perceived before, or which have sprung from new conditions. Under our peculiar system we leave these rights, for the most part, to the protection of the States ; but in what I shall say on this occasion I shall avoid speaking particularly of the distinctions between State and Federal law. The proper method of study for the constitutional system of the United States I conceive to be, to consider it as a unity, with all the mutual interaction and interdependence of rights and obligations. Chief Justice Taney once said : "The constitution of the United States, and every article and clause in it, is a part of the law of every State in the Union, and is a paramount law." He might truly have added that State constitutions and laws are a necessary part of the federal system ; the Union itself having been formed and perfected in order to their preservation. This is sometimes overlooked, and the Federal system and the State system are discussed as if each was complete in itself, instead of being, as each is, the necessary complement of the other ; and, in thus discussing them, we get one-sided and imperfect views, which lead us into dangerous errors.

If we compare the constitution of the United States with any constitution that was in existence when it was formed, two things will particularly arrest the attention. The first of these is the greater particularity and completeness of the federal constitution ; the fact that it goes into all the particulars of governmental authority. In other countries such constitutions as then existed were for the most part confined to the settlement of a few leading principles ; scarcely going farther in some instances than to fix the course of descent for the crown. The second is, the constitution of the United States was fully written out ; its every section, sentence, and phrase agreed upon and formulated ; whereas other

constitutions rested altogether in immemorial usage, and were for that reason necessarily somewhat vague and indeterminate. This was the general truth. The constitution of England was exceptional in its completeness, and also in the fact that its leading principles had from time to time been formulated and expressed in public charters. Nevertheless it still remained an unwritten constitution ; its principles evidenced chiefly by usage. No one or two or any number of charters could be pointed to as forming alone or collectively the entire constitution of the realm. The fact that the constitution of England has been so beneficent, and that it has answered so well the needs of a liberty-loving people, has often suggested the question of the relative merits of written and unwritten constitutions. To us, as Americans, such a question has only a speculative interest. The people of the United States had no choice as between these two methods of expressing the fundamental law ; a written constitution was for them a necessity of the situation. This is manifest from the fact that they were creating a government, and had to agree upon what should be its departments and its officers. When this was agreed upon there were no such immemorial usages determining what powers should be exercised by the one or by the other as existed in other countries, and a definition and limitation of powers were therefore essential. In short, the whole machinery of government required a written expression ; since in this way alone could the powers of those who should have authority under it be defined, and the duties and obligations of citizens be determined. Necessity thus compelling a written constitution, the question of comparative advantages of the written and the unwritten could not possibly be to them one of practical interest. To the student of politics, however, such a question must always have importance, whether it be abstractly considered, or, on the other hand, be examined in the light of illustrative instances. And for the purposes of illustration history presents no other instances which are comparable in value to those of the constitutions of England and of the United States. These two easily rank first in importance because of their strength, their age, their completeness, their hold upon the regard of the people, the great measure of liberty they secure, and the ease with which they admit of safe improvement. This fact of supremacy is so far recognized that all other nations when they enter upon the duty of perfecting constitutional forms, or enlarging constitutional

principles, turn as a matter of course to Britain and to America for enlightenment and direction.

The statesman who for such a purpose contemplates the constitution of England perceives that it is a body of principles and usages resting in prescription, the outgrowth of national history, expressive of national aims and thought, and the national conviction of what is best, or at least is most politic, in government. All these principles and usages have been of gradual establishment, and have been enlarged and improved as a result of a growing spirit of liberty among the people and of concessions to that spirit on the part of the governing classes. I think we may justly call this the natural method of constitution building. No constitution otherwise formed can so completely adapt itself to the needs and thoughts of the people as the one that springs directly from the national life, has been moulded by the events of national history, and constitutes an expression of the popular idea of government, and of what are its proper functions and limitations. It then fits as a garment, and no other will. But history shows us that all government originating otherwise than by formal charter begins in despotism and with a governing family or class ; and in the growth of a prescriptive constitution there is necessarily something in the nature of a continuous struggle between the rulers on the one hand and the people on the other,—a struggle which in the main may be peaceful, but is liable at times to blaze out in civil war. Ever since the overthrow of Napoleon I. a struggle of this sort has been going on in nearly every European country, with varying successes and many bloody incidents, but with a general tendency in the direction of greater liberty. The free constitution in any case is only won slowly, and by minute, perhaps imperceptible, advances. We do not mark the changes from year to year ; they are commonly seen only from age to age ; in time the England of the robber Normans becomes the England in which the representatives of the commons wield the sovereignty, and the crown has left to it little beyond nominal power. It is not unreasonable to assume that nothing could be better or safer than such a growth, or could give better promise of permanency. Nevertheless, an inherent weakness is seen in this : that there may at any time be dispute as to whether any particular principle has so far become accepted that it constitutes a part of the constitution, and the dispute may only be settled through

resort to civil war. Under such a constitution, too, the legislative power is necessarily supreme, and under the influence of temporary excitement it may remodel the constitution at will, and eliminate from it any principle, however important or venerable. It is scarcely possible that the powers of government should be thus abused under a written constitution which, like that of the United States, was the origin of the government itself. Such a constitution is "a code of finalities," or, as some have called it, "a rigid constitution." It creates departments and agencies of government, and confers powers upon them. The very specification of powers is a limitation ; and, unless by manifest usurpation, public authorities can exercise none that are not in terms conferred. They cannot, therefore, annul, set aside, or suspend any constitutional principle, for the plain reason that no authority to do so has been given. The declarations of rights which in Britain are merely advisory to parliament are in the federal constitution imperative commands. Chief Justice Marshall stated the principle succinctly when he said : "The government of the United States can claim no powers which are not granted to it by the constitution ; and the powers actually granted must be such as are expressly given, or given by necessary implication." As the constitution itself declares : "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The weakness commonly inhering in a constitution thus formed is that it is formed regardless of the most important principle of all, namely, the principle of growth and expansion. This has been the radical vice of most European written constitutions ; each of them has been framed as if it were the beginning of the nation, instead of being, as it was in fact, merely a step in its progress. No such vice inhered in the constitution of the United States. The instrument is quite as truly a growth as is the constitution of the British Empire ; it is in fact a continuation and natural expression of English liberty. As Mr. Lowell has said : "The acorn from which American democracy sprang was ripened on the British oak." Our fathers wisely clung to what their ancestors had won in their long struggles for personal freedom, — and just as wisely appropriated the general principles of government which in the course of ages had become settled and accepted in England. It was only in a very narrow sense that the new government could

be called a new creation : in its separation of the powers of government, in the division of the legislature into two branches, and in the union of the executive as a third branch, the constitution of England was closely followed. We may say the same as regards the bill of rights, which was added to the constitution by amendments ; the leading principles are all to be found in *Magna Charta* and other charters of English liberty which the people of America at the time of the Revolution had claimed as a part of their inherited freedom, and demonstrated their right to by their success.

It is worthy of note, however, that the principles of liberty which were thus appropriated were likely to have a somewhat different meaning, and to give a broader protection in America than in England. Adopted in America, they took on to some extent an American sense ; they were relieved from implied limitations and exceptions which were known under the English system, but were foreign to American ideas and usages. We imported our law, but in some sense it was raw material to be worked over, and the first step in the process was to relieve it of whatever had come from the recognition of privileged classes, or of classes subject to special burdens. *Magna Charta*, therefore, in its protection of life, liberty, and property by the law of the land means more in America than it did in England ; it is more comprehensive, more impartial. Voltaire has an anecdote of meeting, when in England, a boatman on the Thames, who, seeing that he was a Frenchman, with characteristic boorishness bawled out with an oath that he would rather be a boatman on the Thames than an archbishop in France. The next day Voltaire saw this man in prison with irons on, and praying alms from the passers-by ; and so asked him whether he still thought as seriously of an archbishop in France. "Ah, sir," cried the man, "what an abominable government ! I have been carried off by force to go and serve in one of the king's ships in Norway. They take me from my wife and my children, and lay me up in prison, with irons on my legs, until the time for going on board, for fear I shall run away." A countryman of Voltaire confessed that he felt a splenetic joy that the people who were constantly taunting the French with their servitude were in truth just as much slaves themselves ; "but for my own part," said the philosopher, "I felt a humaner sentiment ; I was afflicted at there being no liberty on earth." If the Frenchman had come to

America at any time after the Union was perfected he would have found that the declaration that no freeman should be deprived of liberty except by the law of the land was as effectual to save the poor boatman from impressment as it could be for the protection of any other class of the people; for here the principle was not merely general in terms, but in spirit; it took in every freeman, and it protected all equally, the boatman at the dock as much as the merchant on the wharf.

Following up briefly the relative merits of written and unwritten constitutions, it will be convenient, first of all, to consider what are the requisites of a good constitution. These are easily indicated:—

I. A good constitution should be plain and certain in its principles, and as far as possible free from doubt and question. In this particular the advantage of the written instrument over the unwritten usages is too manifest for question.

II. A good constitution must be of gradual formation; it must result from the history and experiences of the people, and be the natural and deliberate expression of their thoughts, wishes, and aspirations in government. It is in this particular that the unwritten constitution is likely to be superior, for that is necessarily the growth of time. Every constitution has its antecedents, but the antecedents of the unwritten constitution are likely to lead directly and naturally up to it, while those of the written are liable to be affected by force, fraud, accident, or the misleading of the facile tongues or pens of demagogues or *doctrinaires*. Mr. Gladstone never uttered a more forcible truth than when he said: "No greater calamity can happen to a people than to break utterly with its past;" but this is precisely what it is likely to be urged to do when it is setting up a new constitution on a change in the form of government. But, as has been shown already, the written constitution as well as the unwritten may be a true growth; it may be framed on the plan of embodying the settled principles already evolved and manifested in the history of the people, and of crystallizing them in exact form, instead of leaving them vague and indeterminate as the unwritten constitution in a measure must do. And this was the plan worked out in the constitution of the United States; it was framed on the principle and with the purpose of preserving for America everything in the British constitution which was suited to the condition and circumstances of the new world; and there is not in all history a fundamental law which is a

more genuine growth. Indeed, the changes in adopting it were scarcely greater than took place in England when the Stuarts were sent over the water and William of Orange was made king.

III. A good constitution should definitely apportion the powers of government between the several departments, and draw such clear lines of distinction as to prevent collisions and usurpations. It is in this apportionment that the superior advantages of the written constitution are most conspicuous. Under an unwritten constitution the legislature, whether it be monarch or parliament, is almost necessarily supreme. It makes laws for all, and all must obey them. In the rise of parliamentary authority the parliamentary body always determines for itself the limits of its authority, so that its power is bounded only by its discretion. The checks upon it, which the other departments of the government afford, are necessarily feeble, and may be disregarded. If a veto power becomes inconvenient or distasteful it will be abolished, just as in effect it has been abolished in England. Such written declarations of constitutional right as may be made from time to time are but laws, and may be changed at will. In pointed contrast to this is the legislative power under the written constitution, for that power is limited in the very grant, and every attempted law which goes beyond the grant is merely idle words, and may be treated as null by all citizens, whether in public or private station. Moreover, the grant of judicial power to another department is a grant of authority which includes the right to adjudge that to be no law which the legislature has attempted to enact beyond its jurisdiction, and the courts must protect the citizen in disregarding it. The check upon absolutism in government would thus seem to be as complete as human wisdom can make it.

IV. A good constitution should be beyond the reach of temporary excitement and popular caprice or passion. It is needed for stability and steadiness; it must yield to the thought of the people; not to the whim of the people, or the thought evolved in excitement or hot blood, but the sober second thought, which alone, if the government is to be safe, can be allowed efficiency. And here, again, the superior advantage of the written constitution is manifest. The unwritten is at the mercy of the temporary popular passion, and precedents may grow up from abuses before the sober second thought has come. The written compels delay through the steps it requires to be gone through with, and there

is thus time for temporary passions to cool and for excitements to pass away; it begets a conservative habit of mind, which of itself is of the highest value. Changes in government are to be feared unless the benefit is certain. As Montaigne says: "All great mutations shake and disorder a State. Good does not necessarily succeed evil; another evil may succeed, and a worse; as it happened to Cæsar's killers, who brought the republic to such a pass that they had reason to repent their meddling with it."

V. But, as change in government is according to the order of nature, a good constitution should provide for safe growth and expansion. Here, again, it may be hastily concluded the unwritten has advantages. What growth can be better, it may be asked, than that which is going on from day to day, imperceptibly, and is finally officially and formally recognized when it is complete? But, on the other hand, this method of change is accompanied by dangers that may threaten the very existence of government. The settlement of the question is very likely to be a settlement at the point of the sword, as it was not only when the first great charter of English liberty was won, but again when general representation in parliament was secured; and still again when, after forty years of civil strife, it was settled by the revolution of 1688, that the rule of the king of England was not by right divine, but was conditioned on observance of the fundamental law. An appeal to arms is almost necessarily the mode of settlement when the question at issue is one that touches the foundation principles upon which the civil state is based, and especially when it strikes at the roots of ideas and prejudices which are the inheritance of ages; so that all great questions of reform in government are likely to threaten public disorder. We have found the better way when we have agreed upon a method whereby the peaceful ballot may determine whether the time is ripe for a change, and, if so, what the change shall be, instead of leaving the question of change to the arbitrament of force. The choice of methods is thus between ballot and battle, with a reasonable certainty that the one, while it is peaceful, will truly express the actual public judgment; while the other, besides being destructive, may prove nothing beyond the fact that the fortune of war for the time being inclines to a particular party. The written constitution thus prepares the way for growth and expansion by steps which give security against public disorder and

violence ; its provisions may be moulded to new thoughts, new aspirations, and new needs, as peacefully as the simplest law on the statute book may be modified ; perhaps with as little discussion. Whoever desires proof of the excellence of this method of constitutional development needs but to note the fact that fifteen amendments to the federal constitution have been peacefully made under the agreed forms. The proof, it may be said, is imperfect, for the last four amendments were born of the civil war. This is true ; but let it be noted that the war was not inaugurated to obtain these amendments ; it was not begun by those who might have desired them. The government was moving peacefully on under the constitution, with full observance of all its compromises ; but those with whom the recognition of slavery was the most important of its provisions saw, or thought they saw, a clear indication of steadily advancing public sentiment that in time would come to demand that this recognition, and the attendant compromises, should be stricken from the instrument. It was to escape an inevitable reform, not, as yet, imminent, but clearly foreshadowed, that the war was begun ; and the four years of bloodshed only precipitated a purification of National and State constitutions, that would otherwise have come more slowly and peacefully, and as a necessary step in national progress.

In all that has now been said by way of comparing written with unwritten constitutions, it is assumed as a postulate that sovereignty is in the political society as a whole, — in the people organized into a State, — and that the constitution is an emanation of the popular will. This is the American theory of government ; but it is more than this : it is the only theory that is rightful. Any other is the offspring of despotic ideas, and, wherever we find it accepted, it is not difficult to trace it to the fact that the government, in its origin, has been a despotism, either of a single rule or of some privileged class or classes. If we would understand why the British parliament is sovereign, rather than the British people, we have only to note how parliamentary power grew up. At the outset we see a realm governed by a king, who made laws at his absolute discretion, and claimed to govern by right divine. Popular rights under this claim were ignored, and the king, for all practical purposes, was the State. When the privileged classes contested the king's assumptions, they claimed the right of legislation, not for the great body of the people, but for them-

selves as privileged orders. The point of contention, therefore, was, whether it was the king who was sovereign, or the parliament, in which the privileged classes alone were represented. Nobody contended that the people were sovereign. The power passed in time from king to parliament, but there never was a day in the history of the country when the sovereign power was not wielded by the law-making authority. In the United States, on the other hand, there never was a time when, both as a theory and as an actual fact, there was not back of the legislature an effective sovereign power in the people.

I now lay down the proposition that, by reason of the facts already stated, the constitution of the United States is the most conservative instrument of government known to the world. Possibly one who is accustomed to look upon the United States as the chief representative of political progress, and to regard conservatism as the antagonism of progress, may see in this statement a contradiction in terms. But it is, nevertheless, true. Progress is assured through the conservative features of the constitution, in harmony with which the progressive spirit of the people acts and moves. In the fact that the constitution, though at any particular time binding inflexibly, is, nevertheless, subject to safe amendment, is to be found our security for what we have, and the possibility of anything better that time and experience may demonstrate the need for. When, as has commonly been the case with republics, the vote of an excited assembly may at once put anything into the constitution or put anything out, the republic itself is at the mercy of the fears, the passions, or the prejudices of the hour, and a dictator may come as naturally as a change in the seasons. Andrew Jackson, in one of his letters in the period of nullification, showed a true perception of the strength of the constitution when he said: "Perpetuity is stamped upon the constitution by the blood of our fathers, by those who achieved as well as those who improved our system of free government. For this purpose was the principle of amendment inserted in the constitution." But the provision for amendment was purposely made conservative. The President cannot change the constitution; Congress cannot change it; the people themselves cannot change it hastily, under the influence of temporary passions and excitements. The process is safe, but necessarily slow and deliberate. And such it ought to be. The constitution emanated from the

will of the people ; it expressed the best thought of the day ; it was agreed upon and put in force because it was found to be excellent. And surely, in changing things excellent in government, no maxim of statesmanship can be wiser than to make haste slowly. The constitution stands before the people as an emblem of strength and stability, and it begets in them a conservative habit of thought and of action which of itself is invaluable. But what, in respect to the constitution, is more conservative even than any express provisions or single feature is the fact that it is adapted to the needs and sentiments of the country, and the people are content with it. This is not only more important to the country, but is infinitely more valuable in giving confidence and security in our intercourse with other nations than great fleets or powerful armies. Matthew Arnold, after his visit among us, in his criticism of what he found here, said : " The more I saw of America, the more I found myself led to treat institutions with increased respect. Until I went to the United States I had never seen a people with institutions which seemed expressly and thoroughly suited to it ; I had not properly appreciated the benefits proceeding from this cause." To look farther for the secret of the superior merit of American institutions is needless ; they spring from national thoughts, sentiments, and impulses, and are therefore more expressly adapted to the people and their needs than are those of any other country. It is because of this that they give content and the blessings which content promotes. When institutions are thus the outgrowth of national thought and expressive of the national judgment, all right-minded people in their daily life and conduct are habitually in harmony with them. The difference between enforcing a law which is but the expression of the common thought, or, on the other hand, enforcing one which, however reasonable in itself abstractly considered, the common thought has not yet appropriated and become habituated to, is so obvious that we need not pause to comment upon it. To the citizen it is the difference between freedom and oppression.

In what is so far said I have treated the constitution as being, while it stands, the final test of law and right. But when any written instrument is to be applied to a great variety of subjects, most of which were not present to the minds of the framers in drafting it, there are likely to arise many troublesome questions in regard to its application. In the decision of such questions

under the federal constitution it has been thought by many persons that construction has unwarrantably expanded the scope of the instrument, so as to strengthen the federal government beyond what was intended. But any accession of federal strength through construction is insignificant as compared to what has come from the gradual march of events, which has made the questioned powers of government signify vastly, I might almost say infinitely, more than they did at first. The bounds of power remain the same, but the new creations that come within its compass give it an importance which those who devised it never dreamed of. When one conveys the lot upon which a palatial dwelling has been erected, he may use the same descriptive terms of metes and bounds as when the lot had value for little more than a playground for school-boys; the dwelling is a mere incident to the lot, and it goes with it in conveyance without question, and also without specification. Analogies to this may be seen in the administration of government under written constitutions. John Quincy Adams early pointed out that within the compass of the power to wage war might be found in some great emergency the power to destroy slavery; and statesmen ridiculed it until the emergency arose under which by the common consent of the loyal people the blow was struck.

The power to regulate interstate commerce when the constitution was adopted had so little immediate interest that it scarcely afforded occasion for the slightest forensic discussion. How is it to-day? The application of steam to locomotion and of electricity to correspondence has worked relatively as great a change in government as it has in the industrial world; it is the federal government, whose functions at first concerned the citizen in his private relations so remotely, which now through its control over internal and external transportation, its cheap and rapid postal service, its taxes that reach us all and reach us often, its absolute control of the currency, and the not remote probability that it may grasp with its unquestionable powers still other subjects which constitute public conveniences; it is the central government rather than the State that now seems to stand before the people as the chief representative of public order and governmental vigor, and as the possessor of general rather than of exceptional and particular powers. It may be that by and by the federal legislature, surveying the field of interstate commerce, and taking

note how State commerce encroaches upon and intermingles with it, crowding it in the same vehicles on the same roads, sharing with it in the same expenses, the rates which are imposed on the one necessarily affecting the rates that can be accepted on the other, and being handled at the same time by the same hands, under the same official control, will come to the conclusion that a separate regulation of State commerce must necessarily be, to some extent at least, and may be to a large extent, inconsistent with complete federal regulation of the commerce that is interstate. Should that conclusion be reached, the federal legislature is not unlikely to take to itself complete regulation of the whole; and, if it shall do so, it will but add another to the many illustrations already to be seen in our history, which go to show how vast is the edifice that may rightfully be erected within the bounds of single federal powers, which at first seemed of little importance.

Briefly, in conclusion, we may be permitted to bring together for contrast certain varieties of fundamental law.

Of all the constitutions which may come into existence for the government of a people, the most excellent is obviously that which is the natural outgrowth of the national life, and which, having grown and expanded as the national thought has matured, is likely at any particular time to express the prevailing sentiment regarding government, and the accepted principles of civil and political liberty.

Of all the constitutions which a people ever accepts for its organic law, the least valuable is that which it suffers to be made for it on the principle of turning the back upon the national experience, dissevering the nation's future from its past, and laying the framework of government in ideal perfection. Such a constitution may possibly in time acquire permanence, but it can never antecedently be predicated of it that the people will so far appropriate its ideas, adapt themselves to its methods, and allow it to take root in their every-day life as to convert it into an institution. In proportion as it differs from governmental thoughts and systems which are displaced by it, the probabilities are not only against its usefulness while it stands, but they are against its stability also.

Of all the constitutions which a people makes for itself, the best is that which is written with close hold on the past, but which, with foreseeing eye, prepares the way for appropriating

the lessons of a progressive future. Only such a constitution can embody the essential excellences, and can so far harmonize the conservative and the progressive principles that the one will become the complement of the other, in steadily, but cautiously and safely, moulding the instrument to greater perfection.

The purely prescriptive constitution has neither the weaknesses of the first of these, nor the supreme excellences of the other. As we see it in the best existing representative, the English constitution, it embodies the much-praised principle of direct executive responsibility to public opinion ; but this, though often taken to be peculiar to the constitution of this class, may be very readily made a feature of the written constitution, and will be so whenever the people become convinced of its desirability. Indeed, there is no feature whose excellence in the prescriptive constitution has been demonstrated by time and experience that may not be appropriated in the written constitution, or that is not likely to be appropriated by a people who deal with the subject as the American people are taught to do, at once reverently as regards the past and courageously as regards the future.

Thomas M. Cooley.

WASHINGTON, D.C.